GOH KIM LOH & ANOR. v. JARDINE MATHESON ESTATE SDN. BHD.

[O.C.J. (Wong Kim Fatt J.C.) November 10, 1981]
[Seremban — Civil Suit No. 56 of 1977]

Tort — Negligence — Contributory negligence — Duty of care — Burning of trees — Spread of fire to neighbouring land — Liability — Damages.

In this case, the defendants were burning on their land felled rubber trees for replanting. The fire spread to the neighbouring land of the plaintiffs and destroyed their rubber trees. The plaintiffs sued the defendants for damages and the defendants pleaded contributory negligence.

Held: (1) there was duty of care on the part of the defendants to contain the fire on their own land and to prevent its spread to the neighbouring land;

(2) knowledge on the part of the plaintiffs that the defendants would on some unknown date in the future burn the felled trees or omission on the part of the plaintiffs to ask the defendants when they would burn the trees does not constitute contributory negligence;

(3) in the circumstances the defendants were liable in damages.

Cases referred to:-

(1) *Black* v. *Christchurch Finance Co. Ltd.* [1894] A.C. 48.

(2) *Lim Pit Seng & Ors.* v. *Lai Ngion Siew & Ors.* [1974] 1 M.L.J. 133, 134.

CIVIL SUIT.

Ting Poi Tek for the plaintiffs.

James Ponniah for the defendants.

Wong Kim Fatt J.C.: In this action the plaintiffs sued the defendants for damages suffered as a result of fire spreading from the defendants' land where the defendants had set fire to the felled rubber trees for the purpose of replanting. It was agreed between the parties at the trial that the only issue for determination by the court was whether there was contributory negligence on the part of the plaintiffs. It was also agreed that in the event of the plaintiffs succeeding in their action, the quantum of damages be $40,000 on which interest at 3% per annum is payable from the date of the fire, i.e. February 10, 1976, to date of judgment, and at 8% per annum from the date of judgment to date of realisation.

In support of the plaintiffs' claim, Goh Kim Loh, the first plaintiff and the only witness in these proceedings, gave evidence on oath and referred to his police report and the photographs which were included in the Agreed Bundle of Documents. He stated in evidence that on February 10, 1976, he was on his way to his rubber land at Air Mawar, Mukim of Johol, State of Negeri Sembilan, where he was informed by his head worker that the rubber trees on the plaintiffs' land were on fire. After hearing this, the first plaintiff made the police report at the Johol police station where he remained for about half-an-hour. A fire engine arrived within 25 minutes of his arrival at the police station, and he led the firemen to his rubber land, where the firemen, policemen, and his workers helped to put out the fire which was extinguished in about 30 minutes. He further stated that the defendants were at the time carrying out replanting of rubber on their land Lot 4640, Mukim of Johol (an agreed fact), and that the fire started from the defendants' land and spread to the plaintiffs' land, while the defendants were burning the felled rubber trees on their land. The evidence of the witness was never seriously challenged and I have no reason to doubt his credibility.

The defendants called no witnesses and their counsel had the unenviable task of trying to establish their claim of contributory negligence through the process of cross-examination, during which the first plaintiff answered that he knew that after the trees were felled on the defendants' land they would eventually be burnt, but he did not know when. He had no experience in replanting and did not ask the defendants when they were going to burn their trees. Counsel for the defendants submitted that these answers given in cross-examination would show or imply that there was contributory negligence on the part of the plaintiffs. He was, however, unable to furnish the court with any authority for his proposition. On being questioned by the court, he agreed, and quite rightly so, that the defendants owed a duty of care to the plaintiffs to ensure that the fire on the defendants' land did not spread to the plaintiffs' land to cause damage to the property.

In my judgment, the law is clear that if the defendants lighted fire on their land and if the fire spread to the plaintiffs' land and caused damage to the plaintiffs' property or caused injuries to persons in breach of the defendants' duty of care, the defendants would be liable in damages to the plaintiffs.

The law on the subject was well stated by Lord Shand in the Privy Council in *Black* v. *Christchurch Finance Co. Ltd.*,[1] an appeal from the decision of the New Zealand Court of Appeal. His Lordship said at page 54:

> "The lighting of a fire on open bush land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property *(sic utere tuo ut alienum non laedas)*. And if he authorizes another to act for him he is bound, not only to stipulate that such precautions shall be taken, but also to see that these are observed, otherwise he will be responsible for the consequences."

This case was cited with approval by the Federal Court in which Suffian C.J. (as he then was), dealing with an appeal involving the burning of felled trees for replanting, said in *Lim Pit Seng & Ors.* v. *Lai Ngion Siew & Ors.*[2]:

> "We have not said much about negligence because we are of the opinion that it is common knowledge in Malaysia, the world's largest producer of natural rubber, that burning off on one's rubber smallholding can be quite safe if conducted with care, but burning off for replanting, when every tree has been cut down, heaped up and left to dry before being set fire to, is, in the above-quoted words of the Privy Council, an operation necessarily attended with great danger, because the fire may readily spread to adjoining property and cause serious damage."

On the facts, the defendants as owners of the land which adjoined the plaintiffs' land knew or ought to have known that the operation of felling the rubber trees and later drying and burning them for the purpose of replanting was potentially one of great danger. There is no evidence to show the defendants had taken

any precaution or preventive measure whatsoever to contain the fire on their own land and to prevent the spread of the fire to the neighbouring land of the plaintiffs. The trees for burning were not properly heaped up and no fire gullies were made by the defendants.

Knowledge on the part of the plaintiffs that the defendants would on some unknown date in the future burn the felled trees or omission on the part of the plaintiffs to ask the defendants when they would burn the trees does not, in my opinion, constitute contributory negligence in the circumstances of this case. On the contrary, the defendants were negligent in failing to take reasonable measure and precaution to ensure that the fire lit by them on their land did not cause damage to property on the plaintiffs' land.

In the result, the defendants' contention that there was contributory negligence fails. I hold that the defendants were solely to blame for the damage caused. There will be judgment for the plaintiffs against the defendants for $40,000 with interest thereon at 3% per annum from February 10, 1976, to date of judgment and at 8% per annum from date of judgment to realization and costs to be taxed.

Claim allowed.

Solicitors: *Ting Poi Tek & Co.; Stanley Ponniah, Ng & Soo.*

UNITED ASBESTOS CEMENT BHD. v. UNITED COMMERCIAL TRADING (M) SDN. BHD.

[O.C.J. (Arulanandom J.) March 30 & August 26, 1981]
[Penang — Civil Suit No. 535 of 1980]

Practice and Procedure — Statement of claim — Application to strike out — R.H.C. 1980, O. 18 r. 19.

Shipping Law — Bills of Lading required to give badge to carriers — Scope of art. III r. 6 of First Schedule to the Carriage of Goods by Sea Ordinance, 1950.

The plaintiffs sued the defendants who were owners of a lighter under an agreement, whereby the defendants at the plaintiffs' request should from time to time act as forwarding agents, carriers and bailees for reward of the plaintiffs failed to deliver the plaintiffs goods unloaded from the ship S.S. Prometheus on August 4, 1978. The defendants applied for an order that the statement of claim in the action be struck out forthwith and the action herein dismissed with costs under the provision of O. 18 r. 19 of the Rules of the High Court 1980. The defendants claimed that the plaintiffs' claim in the action was not brought within the year from the date when the goods, the subject matter of this action, should have been delivered, as mandatorily required under the provision of rule 6 of Art. III of the First Schedule of the Carriage of Goods by Sea Ordinance. The said goods should have been delivered on August 4, 1978 but the action was brought and commenced only on November 20, 1980 after a period of over two years when the said goods should have been delivered.

The only issue was one of law. It was agreed that if the defendants were carriers, then they would be entitled to judgment on the motion under the Carriage of Goods by Sea Ordinance and the Hague Rules.

Held, dismissing the application: the question whether the defendants are carriers or bailees cannot be determined purely on affidavits as evidence has to be led to determine the exact relationship between the plaintiffs and the defendants. In this case there were no Bills of Lading which usually give the badge to carriers. Hence, unless it is established by evidence that there was a Bill of Lading or any similar document of title which regulates the relations between a carrier and holder of the same, the court is in no position to strike out the action.

CIVIL SUIT.

R. Rajasingam for the applicants/defendants.

Lim Kean Chye for the respondents/plaintiffs.

Cur. Adv. Vult.

Arulanandom J.: This was an application by the defendants/applicants for an order that the statement of claim in the action be struck out forthwith and the action herein dismissed with costs under the provisions of Order 18 rule 19 of the Rules of the High Court 1980 on the grounds that the plaintiffs' claim in the action herein was not brought within one year from the date when the goods, the subject-matter of this action, should have been delivered, as mandatorily required under the provisions of rule 6 of Article III of the First Schedule to the Carriage of Goods by Sea Ordinance (No. 13 of 1950). The said goods should have been delivered on the August 4, 1978 but the action herein was brought and commenced only on November 20, 1980 after a period of over two years when the said goods should have been delivered.

The First Schedule Article III rule 6 of the Carriage of Goods by Sea Ordinance 1950 reads as follows: —

"In any event the carrier and the ship shall be discharged from all liabilities in respect of loss or damage unless suit be brought within one year after delivery of the goods or the date when the goods should have been delivered."

In this case the plaintiffs sued the defendants who were the owners of a lighter PC 2817 under an agreement in writing whereby the defendants at the request of the plaintiffs should from time to time act as forwarding agents, carriers and bailees for reward of the plaintiffs failed to deliver the plaintiffs goods unloaded from the ship s.s. Prometheus on August 4, 1978.

The facts are not disputed. The only issue was one of law. It is agreed that if the defendants were carriers, then they would be entitled to judgment on the motion under the Carriage of Goods by Sea Ordinance and The Hague Rules which were adopted by this country in 1956.

But the respondents/plaintiffs argue that the defendants are not carriers but are sued as bailees and if their contention is correct then the defendants are not entitled to judgment on the motion summarily without trial. The question whether the defendants are carriers or bailees cannot be determined purely on affidavits as evidence has to be led to determine the exact relationship between the plaintiffs and the defendants. In this case there were no Bills of Lading which usually give the badge to carriers. Item (b) under the heading "Definitions" in the First Schedule to the Carriage of Goods by Sea Ordinance "Rules relating to Bills of Lading" reads as follows: —

"(b) 'contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any